NO. 83-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES BEN HOWELL, PETITIONER

V.

STATE BAR OF TEXAS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

BRIEF FOR RESPONDENT

IN OPPOSITION TO CERTIORARI

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit properly applied the holding of District of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1303 (1983), to the case at bar and concluded that the district court lacked jurisdiction to decide all of the Petitioner's claims that were inextricably intertwined with the state court's decision. The Court of Appeals further correctly recognized that the England reservation did not apply in this case because this case is not a Pullman abstention case but instead is purely a Younger situation.

ARGUMENT

Introduction

The Fifth Circuit Court of Appeals' opinion of May 3, 1982, Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (PA 9), was vacated by the United States Supreme Court on April 4, 1983, and remanded for consideration in light of Feldman. 103 S.Ct. 1515 (1983) (PA 19).

In Feldman, this Court held that federal district courts have no authority to review final judgments of state courts in judicial proceedings but do have subject matter jurisdiction over general challenges to state bar rules promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a specific case. 103 S.Ct. at 1315-17. The Court noted that a party's failure to raise his

constitutional claims in state court does not bestow jurisdiction upon the federal court but in fact might result in the forfeiture of the party's right to review. Id. at 1315 n.16. The Court concluded, "[W]e expressly do not reach the question of whether the doctrine of res judicata forecloses litigation on [the general constitutional challenge] elements of these complaints." Id. at 1317.

Upon remand, the Fifth Circuit Court of Appeals recognized that Howell was calling upon the federal district court to review the state court judgment, which was beyond the federal court's power. 710 F.2d 1075, 1076-77 (5th Cir. 1983) (PA 3-6). The Fifth Circuit Court of Appeals next held, also in line with Feldman, that the federal district court did have subject matter jurisdiction over Howell's general constitutional attack on

the Texas' disciplinary scheme. The court then reinstated Part III of its prior opinion. Id. at 1078.

In Part III of the previous opinion, the Fifth Circuit rejected the State Bar's arguments that res judicata barred litigation in the federal court of claims that could have been raised in the state court. 674 F.2d at 1031. The Fifth Circuit Court of Appeals said that "rules of preclusion and the mandate of 28 U.S.C. § 1738 can still be suspended under the England reservation mechanism or when the federal party against whom preclusion is asserted did not have a full and fair opportunity to litigate his federal claims in state court." Id. (footnote and citations omitted). The court then held that "a hybrid of the England and full-and-fair opportunity exceptions requires that res judicata not apply in this case." Id. The court explained:

> We have already noted that the district court's promise to Howell that England offered a road back to federal court was not supported by the law. Nonetheless, that promise induced Howell to hold back his federal claims once he was relegated to state court. As a result, he could hardly be said to have had a full and fair opportunity to present his federal claims in state court even though such an opportunity was in theory present. Had Howell lodged his federal claims in state court, he would have forsaken the chance he had been offered to return to federal court. We are unwilling to punish Howell for his reliance on the federal district court's guidance. His federal claims are not barred by res judicata.

Id. (footnote omitted). In a footnote, the court asserted that its "hybrid" exception was not the same as the "simple justice" exception expressly rejected by the Supreme Court in Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 (1981). Howell, 674 F.2d at 1031 n.9. The court blamed Howell's predicament not on Howell but on the "faulty ruling" of the district court in its order of March 4, 1976, denying Howell's motion for a

preliminary injunction to enjoin the state disciplinary action. Id.

In spite of this Court's order of April 4, 1983, 103 S.Ct. 1515, remanding this case to the Fifth Circuit Court of Appeals for further consideration in light of Feldman (PA 19), and in spite of the fact that the Fifth Circuit Court of Appeals has remanded this case to the district court for disposition of the merits of Howell's general constitutional challenge to Texas' disciplinary procedure (PA 7-8), Howell now petitions this Court, arguing that Feldman is inapplicable and that he preserved full federal review by invoking an England reservation.

England is not Applicable to This Case

Contrary to the primary thrust of Howell's arguments, this case is not an England abstention case. It instead properly falls into the Younger line of

cases, as recognized by the district court in its letter opinion of July 24, 1980 (PA 18); see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 102 S.Ct. 2515 (1982).

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 417 (1964), clearly stemmed from Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). England, 375 U.S. at 423 (Douglas, J., concurring). Justice Douglas noted in his concurring opinion that there are many occasions when federal courts abstain, dismissing actions such as suits to enjoin criminal prosecutions. He wrote: "[Pullman] is a different kind of case. There the federal court does not abstain; it does not dismiss the complaint; it retains jurisdiction while the parties go to a state tribunal to obtain a preliminary ruling--a declaratory judgment--on state law questions." Id. In England, the plaintiffs

were graduates of chiropractic schools who could not meet the requirements of the state medical practice act. They filed suit in federal district court seeking an injunction and a declaration that the state statute as applied to them violated the Fourteenth Amendment. The district court invoked the abstention doctrine and sent the plaintiffs to the state's courts to get a ruling on the act. Id. at 412-13.

The factual background in England differs sharply from that of the case at bar and brings into clear focus the inapplicability of England to this case. Here, the state disciplinary suit was already in progress when Howell sought to enjoin the state proceedings in federal district court. The federal court properly denied Howell's motion for a preliminary injunction pursuant to Huffman v. Pursue, Ltd., 420 U.S. 592 (1974) and

Younger v. Harris, 401 U.S. 37 (1971) (PA 22). (The court then held out the mistaken promise of an England reservation which has resulted in the present, continuing litigation.)

Younger's application to this case is impossible to dispute. The Supreme Court has held that Younger principles specifically apply to attorney disciplinary proceedings. Middlesex County Ethics Comm., 102 S.Ct. at 2521-24.

The federal district court ultimately dismissed this case on Younger principles as extended to civil proceedings in Moore v. Sims, 442 U.S. 415, 423 (1979) (PA 18). The district judge recognized in his letter opinion of July 24, 1980, that England did not apply:

> [The England] Plaintiffs . . . were told to file a lawsuit in state court for an authoritative construction of a state statute so that a constitutional claim would not be decided if the statute were construed in Plaintiff's favor. Plaintiff here [Howell] was not the

> Plaintiff in the state court suit . . . and was not seeking the construction of a state statute. He was the Defendant in a case in which the Plaintiff won an affirmative judgment against him. His constitutional claims were more of a compulsory defense in that suit. See Moore v. Sims, 442 U.S. 415 (1979).

(PA 18).

Howell places great emphasis on the fact that he was in state court "against his will," claiming such as a key distinction between this case and Feldman. However, Younger and its progeny concern situations in which the federal plaintiffs also were in state court "against their will." Such factor does not affect the Supreme Court's clear mandate that the pertinent inquiry is whether the state proceedings afford adequate opportunity to raise constitutional claims. Middlesex County Ethics Comm., 102 S.Ct. at 2521; see also Moore v. Sims, 442 U.S. at 430 n.12.

Feldman directs that where litigants seek review in federal district court of issues inextricably intertwined with a state court judgment, the federal district court lacks subject matter jurisdiction over the claims. 103 S.Ct. at 1315. Adhering to Feldman, the Fifth Circuit Court of Appeals stated, "A district court's erroneous interpretation of the law, even when combined with a litigant's asserted reliance on the error, cannot create jurisdiction where it would not otherwise exist." Howell, 710 F.2d at 1078. In other words, abstention where no subject matter jurisdiction exists reserves nothing.

Feldman expressly applies to attorney disciplinary cases. The Court notes the importance of recognizing the strength of the state interest in regulating the state bar and quotes with approval MacKay v. Nesbett, 412 F.2d 846

(9th Cir. 1969): "Orders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court . . . ." 103 S.Ct. at 1315-16 n.16 (emphasis added). Howell's contentions belie this Court's express authority otherwise.

Finally, Howell has been awarded his day in federal district court to hear his general constitutional attack on DR 1-102(A)(5) of the Texas Code of Professional Responsibility. If the Fifth Circuit Court of Appeals committed any error in its reconsideration of this case, it was in refusing to apply res judicata to foreclose litigation of this one remaining claim, the only question left open by the **Feldman** decision.

CONCLUSION

Feldman controls this case and reiterates the long-standing rule that federal district courts cannot sit in direct review of state court judgments. The federal district court's promise of an England reservation of federal claims was erroneous and could not create jurisdiction where it never existed.

The Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry L. Zunker, counsel of record for Respondent and a member of the Bar of this Court, do hereby certify that on this 30th day of March, 1984, three copies of the above and foregoing Brief for Respondent were served by mail on Tom Scott McCorkle, Jr., 500 Katy Building, 701 Commerce Street, Dallas, Texas 75202, counsel of record for the Petitioner.

Jerry L. Zunker